56514

16 pgs

FILED

DEC 10 2007

OFFICE OF THE CLERK

No. 06-1646

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ,

Respondent,

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with a direct national membership of more than 12,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958. Its mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. In furtherance of this and its other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1]

SUMMARY OF ARGUMENT

Insofar as the government is correct that the Armed Career Criminal Act ("the ACCA") directs this Court to determine the "maximum [punishment] to which the defendant was actually subject as a recidivist," Gvt. Br. 27, Mr. Rodriquez has ably explained why the statute's phrase "maximum term of imprisonment" must incorporate state statutory sentencing provisions that limited a defendant's actual sentencing exposure. Resp. Br. 38-45. NACDL files this brief to emphasize that the ACCA's term "offense" requires – even more fundamentally – the same result.

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent from the parties are on file with the Clerk.

In determining whether a state offense was punishable by ten years, it is necessary to pin down exactly what offense the defendant was convicted of committing. States that have determinate sentencing systems such as Washington's divide each crime into two possible offenses: an ordinary offense and an aggravated offense. This Court's Sixth Amendment jurisprudence – most notably, *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) – dictates that when, as here, a defendant in such a system is convicted of an ordinary offense, then his maximum term of imprisonment is the top of the standard sentencing range. What is more, the top of a standard sentencing range in Washington does not change depending on the applicability of the recidivism enhancement at issue here. This enhancement heightens a defendant's actual sentencing exposure only when he is convicted of an aggravated offense, and the state court did not make such a finding here.

This same analysis makes sense under the ACCA. Congress left it up to states to determine which drug crimes are punishable by ten or more years, and the Washington Legislature has determined that ordinary drug crimes such as Mr. Rodriquez's prior convictions do not rise to that level of seriousness. There is nothing about this Court's modified categorical approach to ACCA predicates that makes it improper or practically difficult to give effect to this determination. Indeed, this Court must do so if it is to make sense of the majority of sentencing systems in the Ninth Circuit for purposes of assessing the government's position in this case.

ARGUMENT

A. The ACCA's Focus on the Particular "Offense" for Which the Defendant Previously Was Convicted Dictates that the Top of the Standard Range Is the Statutory Maximum for Ordinary Washington Offenses.

1. The Armed Career Criminal Act provides that an offender facing a felon-in-possession charge under 18 U.S.C. § 922(g) may be eligible for a fifteen-year mandatory minimum based on recidivism if the offender has previously been convicted of, as relevant here, a "serious drug offense." 18 U.S.C. § 924(e)(1). A "serious drug offense" is defined as "*an offense under State law* . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(ii) (emphasis added).

As is evident from the plain text of this provision, the key word in the statute is "offense." Until the offense is known, the maximum term of imprisonment "prescribed by law" for that offense cannot be determined.

This Court has issued a series of recent opinions clarifying what constitutes an "offense" for purposes of the criminal law. An "offense" is the collection of elements that defendant is convicted of or pleaded guilty to, and the facts that satisfy those elements. *See, e.g., Harris v. United States*, 536 U.S. 545, 562-63 (2002). When the presence of an "aggravating fact" allows an "increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a *greater offense*." *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000) (emphasis added); *see also Washington v. Recuenco*, 126 S. Ct. 2546, 2552 (2006); *Ring v. Arizona*, 536 U.S. 584, 604-05 (2002) ("[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravated fact[,] . . . the core crime and the aggravating fact together constitute an

aggravated crime . . . *The 'aggravating fact is an element of the aggravated crime.'*") (quoting *Apprendi*, 530 U.S. at 501) (Thomas, J., concurring) (emphasis added).

Viewed through this lens, the Washington Legislature, in the Sentencing Reform Act of 1981 (the structure of which remains in effect today[2]), divided each of the felonies in the State's criminal code into two new and distinct offenses: an ordinary offense and an aggravated offense. All offenders convicted of an ordinary offense are subject to punishment pursuant to a grid that sets a minimum and maximum sentence based on the specific offense of conviction and the defendant's criminal history. *See* Wash. Rev. Code § 9.94A.310 (Tables 1 & 2) (sentencing grid & offense seriousness level) (1994); Wash. Rev. Code § 9.94A.350 (offense of conviction determines offense seriousness level) (1994); Wash. Rev. Code § 9.94A.360 (offender score) (1994).[3] Assuming that no aggravating facts have been alleged and found, Washington courts are required to sentence a defendant to a term no higher than the top of the prescribed standard range.

If, however, a court finds an "aggravating fact," thereby convicting the defendant of a greater, or

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[2] The Washington Sentencing Reform Act has been amended and recodified several times since its inception. *Amicus* cites to the statutes in effect at the time of Mr. Rodriquez's conviction, which are in all material respects the same as the current versions.

[3] Because the defendant's offender score takes account of prior convictions, the maximum sentencing range under the grid incorporates a defendant's recidivism. But in accordance with *Almendarez-Torres*'s admonition that a defendant's criminal history does not constitute an element of the offense, the recidivism is not used to calculate the defendant's offense level, which is determined solely by the crime of conviction itself. *See Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998); Wash. Rev. Code § 9.94A.350.

aggravated, offense, then the defendant is subjected to a higher sentence than is otherwise permissible. *See* Wash. Rev. Code § 9.94A.120 (1994); Wash. Rev. Code § 9.94A.390 (1994). An example of an aggravating fact is occupying a high position in a drug distribution hierarchy. Wash. Rev. Code § 9.94A.390(2)(d)(iv). When such an extra fact is found, the maximum sentence typically is set by Washington's umbrella statute – that is, the statute that establishes the longest sentence permissible for the applicable "class" of felony. *See* Wash. Rev. Code § 9.94A.120(14) (1994); Wash. Rev. Code § 9A.20.021 (1994).[4]

Thus, Washington has a simple two-tier system for determining the maximum sentence exposure for a prior conviction. For ordinary offenses, the maximum sentence is the top of the statutory sentence range. For aggravated offenses, the maximum is the term referenced in the umbrella statute. In other words, states with determinate sentencing schemes like Washington's have created systems in which umbrella statutes are not the sole determinative provisions in identifying statutory maximums.

This Court recognized this reality in *Blakely*. This Court held that the "statutory maximum" under Washington law for an ordinary offense – at least for purposes of the Sixth Amendment – is the top of the standard sentencing range when that is lower than the umbrella offense statutory maximum. *Blakely*, 542 U.S at 303-04; *see also Apprendi*, 530 U.S. at 483. Effect, and not form, must govern. *See Ring*, 536 U.S. at 602; *id.* at 610 (Scalia, J., concurring) (noting that the effect, rather than the label given, is significant);

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[4] There is one exception to this rule: Washington's determinate sentencing statutes provide that if the maximum of defendant's sentence range in the sentencing grid exceeds the maximum sentence available under the statute classifying defendant's offense, then the latter "shall be" the maximum for purposes of defendant's sentence range. Wash. Rev. Code § 9.94A.420 (1994).

Washington v. Recuenco, 126 S. Ct. 2546, 2552 (2006) (making same point). And the top of the standard range defines the real sentence ceiling for defendant's offense of conviction.

It is irrelevant under this analysis whether a recidivist statute doubles the umbrella statute's outer limit for the crime at issue. Recidivist enhancements affect a defendant's exposure only for an aggravated offense. When a defendant is found guilty only of an ordinary offense, the defendant's maximum sentence remains the top of his mandatory sentencing range. *See* Wash Rev. Code § 9.94A.120; *In re Cruz*, 157 Wash.2d 83, 134 P.3d 1166 (2006) (for purposes of Wash. Rev. Code § 69.50.408(1), prior offense doubles the statutory maximum sentence for the offense class and not the standard sentencing range).[5]

2. In this case, Mr. Rodriquez was convicted of and sentenced for ordinary drug possession and distribution, under Wash. Rev. Code § 69.50.401(a)(D)-(F) (1994). *See, e.g.*, J.A. 43.[6] The umbrella statute had a five-year maximum, and, accounting for his prior drug convictions by applying the recidivism penalty, his statutory maximum for an aggravated offense was ten years. *See* Wash. Rev. Code § 69.50.408(a). But

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[5] The dramatic differences between Washington's Sentencing Reform Act and the federal sentencing guidelines – most notably that the former is statutory and mandatory and the latter are administrative and advisory – render inapposite the government's extended discussion that the ACCA should not turn on the federal guidelines' maximums. *See* Gvt. Br. 31-32; *cf. Cunningham v. California*, 127 S. Ct. 856, 870 (2007) (noting that California's mandatory determinate sentence laws "do not resemble the [federal] advisory system").

[6] Mr. Rodriquez was sentenced to three offenses at the same time, to run concurrently. *See* J.A. 21, 47, 98. *Amicus* therefore refers here to the sentencing range for the first of his two equally most-serious offenses, Conviction No. 95-1-01070-0. *See* J.A. 21; *cf.* J.A. 98.

because the trial court did not find any aggravating facts associated with Mr. Rodriquez's conviction, his *offense of conviction* was an ordinary drug crime. This offense carried a seriousness level "IV" under Washington's Sentencing Reform Act and his offender score was "7", making his statutory sentencing range 43 to 57 months. J.A. 16, 42; *see also* Wash Rev. Code § 9.94A.310 (1994). To put it in plain terms: the upper limit to which Mr. Rodriquez could actually be sentenced for his offense was a legislatively prescribed statutory maximum of 57 months.

As a result, insofar as the government is correct that the exercise for the ACCA purposes is to determine the "maximum [punishment] to which the defendant was actually subject as a recidivist," Gvt. Br. 27, Mr. Rodriquez's maximum had to be 57 months. It does not matter that another Washington statute – be it the umbrella statute or the recidivist enhancement – purported to set a higher statutory maximum. To borrow this Court's language in *Blakely,* the "'maximum sentence' is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator)." *Blakely*, 542 U.S. at 304.

Indeed, this method of pinpointing statutory maximums in the context of applying sentencing enhancements such as the ACCA has origins pre-dating *Apprendi.* In *United States v. R.L.C.,* 503 U.S. 291 (1992), this Court stated that the most "natural construction" of a statute whose application turned on a statutory maximum determination, as the ACCA does here, was to "apply[] *all statutes with a required bearing on the sentencing decision, including* not only those that empower the court to sentence but *those that limit the legitimacy of the exercise of that power.*" *Id.* at 298 (emphasis added). And to the extent that the ACCA is ambiguous as to which statutory maximum to use when the statutes appear to create more than one,

the rule of lenity requires "choos[ing] the construction yielding the shorter sentence." *Id.* at 305.

B. Treating the Top of the Standard Range as the Statutory Maximum for Ordinary Washington Offenses Is Consistent With This Court's Modified Categorical Approach to the ACCA.

Looking to the maximum sentence a defendant actually could have received for his conviction under the Washington statutory system to determine whether that offense qualifies as an ACCA predicate is no more difficult, and no less categorical, than the approach the government is advocating. A district court making that determination with respect to a prior Washington conviction need only look at the state judgment and sentence. *See, e.g.*, J.A. 16, 42, 93 (¶ 2.3) (listing offense seriousness level, offender score, and sentence range). If no aggravating facts were found, meaning that defendant was convicted for an ordinary offense, then the district court would use the top of the defendant's sentence range as the "maximum term of imprisonment" for purposes of the ACCA. *See id.*

If instead defendant was convicted of an aggravated offense, the defendant's judgment and sentence, and accompanying attachments, themselves will reflect the presence of an aggravator. J.A. 16, 42, 93 (¶ 2.4) (providing box for judge to check if grounds existed for "exceptional sentence"). The statutory maximum for that aggravated offense will be the cap set by the umbrella statute for the offense of conviction, which will always be reflected on the face of the Judgment and Sentence pursuant to local court rules. *Id.* (¶¶ 2.3, 2.4); Wash. Crim. Rule 7.2(d) (requiring all courts to use a uniform judgment form and set forth all findings of aggravated circumstances in imposing an aggravated-offense punishment). In either instance, the district court merely looks to documents that this Court has already held proper to consider. *See, e.g., Shephard v. United States*, 544 U.S. 13, 16 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

The government suggests that there might be hypothetical cases in which a judge found aggravating circumstances but chose not to apply an enhanced sentence, and that a defendant's statutory sentencing range could not be used for the ACCA analysis in such a case. *See* Gvt. Br. 33 n.11. But this is an illusory problem. In the unusual circumstance that a court made an oral finding that a defendant qualified for an above-range sentence but failed to memorialize that finding in writing and imposed a within-range sentence, that finding would nevertheless be recorded in the sentencing transcript. (Under Washington's now *Blakelyized* sentencing system, that finding would be present in the jury verdict. *See* Wash. Rev. Code §§ 9.94A.537(1)-(2)) (2006). In any event, the fact that the government may not be able to use every possible predicate conviction for purposes of the 18 U.S.C. § 924(e)(ii) ACCA enhancement due to the failure of a particular state court to make those on-the-record findings is a deficiency that is no different than the government's inability to prove the "generic" burglary elements for proof of a "violent felony" under § 924(e)(2)(B)(ii) in *Taylor*. *Cf. Taylor,* 495 U.S. at 601.

The government also posits that Congress could not have anticipated the manner in which this Court's *Apprendi* and *Blakely* jurisprudence would construe sentencing systems such as Washington's. *See* Gvt. Br. 31. This is a questionable assertion in light of the fact that all this Court did in *Apprendi* was to follow "the uniform course of decision during the entire history of our jurisprudence." *Apprendi,* 530 U.S. at 490. Moreover, in enacting the ACCA, Congress likely did not know how *any* particular state sentencing systems worked, much less which drug offenses each of the states made punishable by ten years. Congress, following federalist impulses, simply set ten years as a mark of general seriousness, and left it to the states to decide when that threshold is satisfied.

But the government's argument ultimately is irrelevant. Even if Congress did know what state crimes at the time of the statute's enactment fell within and outside of the ACCA, it is quite a leap to suggest that state legislatures making subsequent adjustments that remove certain drug crimes from the Act's purview are illegitimate. The Washington Sentencing Reform Act is nothing more than just such a statutory adjustment that created aggravating and non-aggravating crimes through the punishments it set – and that removed the latter from the ACCA with respect to offenses with standard ranges below 10 years.

C. Considering the Effect of Standard Sentences in States Such as Washington Is Essential to Resolving the Question Presented.

The government goes out of its way to accuse Mr. Rodriquez of forfeiting the argument discussed herein and to encourage this Court to avoid the issue. *See* Gvt. Br. 28. As Mr. Rodriquez already has explained, however, this Court has ample authority to reach the argument and indeed must do so if it desires coherently to address the government's own conception of the ACCA. Resp. Br. 38-39, 45 n.22.

NACDL wishes to add, however, that it also is pragmatically critical that this Court reach this argument. The overwhelming majority of defendants convicted of crimes within the Ninth Circuit, where this case comes from, are (or, more important for present purposes, were) subject to determinate sentencing systems such as Washington's. Prior to this Court's *Blakely* decision, six of the nine states in the Ninth Circuit maintained such systems: Washington, California, Oregon, Arizona, Alaska, and Hawaii.[7]

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[7] *See Blakely*, 542 U.S. 296 (Washington system); *Cunningham v. California*, 127 S. Ct. 856 (2007); *State v. Dilts*, 103 P.3d 95 (Or. 2004); *State v. Brown*, 99 P.3d 15 (Ariz. 2004); *Milligrock v. State*,

Only three states with relatively small populations – Idaho, Montana, and Nevada – maintained different kinds of systems.[8] It would resolve little for this Court to decide this case as if the question how Washington's Sentencing Reform Act affects the analysis were waived. Indeed, it would be far better for this Court to say nothing at all about how the ACCA operates in a case such as this than artificially to exclude such a vital component of the analysis.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals should be affirmed.

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118 P.3d 11 (Alaska Ct. App. 2005); *State v. Maugaotega*, 168 P.3d 562 (Haw. 2007).

[8] Even after *Blakely*, five of the nine overall states still maintain determinate sentencing systems (albeit now with heightened procedural protections). Only California has switched to a different kind of system, under a two-year provisional system designed to track this Court's federal-guidelines jurisprudence until further study can be conducted. *See* Cal. Stats. ch. 7 (Sen. Bill No. 40) (2007).

Respectfully submitted,

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December 10, 2007